HARVARD
LAW REVIEW

VOL. XXVIII NOVEMBER, 1914 NO. 1

THE TERMINOLOGY OF LEGAL SCIENCE (WITH A PLEA FOR THE SCIENCE OF NOMO-THETICS)

THE two languages best fitted by circumstances as tools in scientific discussions are English and Japanese, because they can draw traditionally upon two entirely distinct stocks of language-roots (English has virtually three) for the formation of terms. Thus precision in shades of meaning and differentiation of style is attainable. Every student of logic knows, but seldom realizes, the power and the actual historic influence of terms in moulding thought and in affecting the result of controversy. Recently Dr. Wurzel's "Das juristische Denken" (1904) has revealed how deeply the logical aspect of words is responsible for to-day's great problem of securing legal progress by adjusting the functions of judge and legislator.

In law, the German language has been less of an obstacle to German scientific thought than in any other field; because the reception of Roman law, four hundred years ago, furnished a second set of roots for terms used in technical discussion and development of ideas. Four hundred years ago the French law language of Norman descent might have formed a suitable nucleus for the development of scientific legal terminology in England. But England later expelled instead of receiving the foreign law, and English law never developed a scientific terminology. Indeed, its French roots went to form the popular and unscientific law-language.

Hence, little facility for correct thinking. Even the term "jurisprudence" is used in English in a bastard sense, unrelated to any usage elsewhere. And the advantages of the English language have never been utilized for legal science, while the other sciences have freely made use of them.

It is time that we set about developing a proper terminology. With the ground clear, the opportunity is favorable. Though of course it will take a long time to reach an agreement, nevertheless we should essay a beginning. It is a legitimate enterprise for philosophers and jurists.

It is here proposed (I) to offer tentatively a terminology for legal science; (II) to make a plea for the special study of one part of legal science.

I

It is not desired to dispute or to settle now the definition of law itself. Let us assume this:

Law is the *quality of being uniform and regular in a series of events*, whether in human or in external nature. There may, therefore, be cosmic law, moral law, social law, and *jural law*. The last is here involved.

Jural law is a rule expressing the relations of human conduct conceived as subject to realization by state force.

The Science of Law — meaning all systematic knowledge about law — should be divided, not according to the kinds of law, nor the subject of law, but according to *the ways in which we conceive of law as an operative fact in its relations to the world*. Such is the thesis of the present paper. Other classifications seem not to have taken this point of view; hence the excuse for this new one.

Why is it a useful one? Because the data of our thinking about law differ greatly according as we are thinking about it in one or another aspect. For example, — *Is* it the law that a father has a right against him who causes the child's death? To answer this, we look at certain statutes and decisions. *Ought* it to be the law that such a right exists? To answer this, we look chiefly at a different group of materials, regardless of whether the law *is* or is not so. Dynamically, how *did* this actual law *become* whatever it now is? Here, again, we look chiefly at a still different set of data.

Thus, if a science is to be subdivided according to its various

materials, it seems desirable to subdivide legal science from the above point of view. And as law is a peculiar human fact, having no exact analogy in any of the other sciences (political science is the nearest), it is not strange if such a classification would have no direct parallel elsewhere.

In choosing names for the various branches of legal science, let us remember the etymological treasures of our language, and seek to avoid the inherited curse of ambiguity by doing two things, — (1) using recognized roots to form words more or less new, and (2) forming a consistent body of terms. (One need not here recall the various writers, from Whewell down, who have discussed, reproved, and justified this method of terminology. In defense suffice it to say that it has orthodox support; that electrical science is a good example of its beneficence; and that its shortcomings in geology and in chemistry are proofs only that it may or may not be feasible with a given science).

The proposed terminology would be as follows:

The Science of Law as a whole may be termed *Nomology*.

The science may be classified according to the different activities of thought which deal with the fact of law. These are four:

Law may be conceived of as

(1) A thing to be *ascertained* as a fact of human conduct; this branch to be termed *Nomo-scopy*.

(2) A thing to be *questioned* and debated as a rule which by some standard might be different from what it is; this branch to be termed *Nomo-sophy*.

(3) A thing to be *taught* as a subject of education; this to be termed *Nomo-didactics*.

(4) A thing to be *made* and *enforced* by the state organs; this to be termed *Nomo-practics*.

1. *Nomo-scopy* has three branches of activity:

(*a*) It may concern itself with ascertaining the *actual* law of a given moment, by studying the sources in which the existing law is to be found, — statutes, decisions, customs, decrees, etc.; this to be termed *Nomo-statics*.

(*b*) It may concern itself with the former condition, *history*, and development of a rule of law; this to be termed *Nomo-genetics*.

(*c*) It may concern itself with the relation between law and other facts and their sciences; this to be termed *Nomo-physics*.

2. *Nomo-sophy* has three branches of activity:

(*a*) It may take a standard of *logic*, analyze the rules of law, and examine their consistency as a system; this to be termed *Nomo-critics.*

(*b*) It may, by a standard of *ethics* (whether divine, moral, or social) examine their conformity to that standard; this to be termed *Nomo-thetics.*[1]

(*c*) It may, by a standard of *economics* or other policies of social welfare, examine their conformity with this standard; this to be termed *Nomo-politics.*[2]

3. *Nomo-didactics* has a single branch only.

4. *Nomo-practics* has three branches of activity:

(*a*) It may be considered as a rule requiring to be particularized and *applied* in specific controversies and realized in concrete instances, thus giving rise to the *judicial* function, including the

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[1] To illustrate the distinction between Nomo-critics on the one hand, and Nomo-thetics and Nomo-politics on the other hand:

Let the theory of corporate existence be determined on; *e. g.*, let a decision be rendered which goes upon the theory that a corporation is a real person created by the state's franchise; then when two corporations by vote attempt to consolidate, what is the effect, as a logical deduction from the theory already accepted in the prior decision? Most legal decisions under our traditional system reach their result solely by such a standard of reasoning; *i. e.*, they are dealing with the law as a science of Nomo-critics. But now ask whether economic or political conditions and policies ought to permit the consolidation of two corporations, and on what conditions; and here you come into the realm of Nomo-politics.

Again, take Derry *v.* Peek. The promoters of a corporation circulate a prospectus in which erroneous statements are recklessly made; an investor loses money by trusting to the prospectus. One legal question is whether the accepted doctrine of the law of deceit, as hitherto laid down, logically holds the promoters liable; *i. e.*, whether twenty-five prior decisions on various groups of circumstances logically are consistent with such a result. This is Nomo-critics. But if we ask further whether by accepted standards of ethics the rule of law ought to hold the promoter liable, regardless of the logic of prior decisions, we are traveling into Nomo-thetics.

Legal decisions frequently discuss a question by both standards. But they are none the less distinct standards, involving distinct branches of the science.

By the way, Bentham used the word "Nomo-thetics," but, I think, in a different sense.

[2] One might urge that this distinction between the standard of ethics and the standard of economics, etc., is not definite enough to mark off two branches of the science. It is indeed not definite, at boundary points. But that is only because the sciences of ethics and of economics, etc., are at certain points, not distinct. To the extent that they are, a distinction in legal science becomes needful. The distinction between ethics and economics used to be marked enough, fifty years ago. Perhaps it will become so again.

advocates and other court officers; this to be termed *Nomo-dikastics.*[3]

(*b*) It may be considered as a rule requiring to be formulated by some form of expression of the state's will, thus giving rise to the *legislative* function and its methods; this to be termed *Nomo-poietics.*[4]

(*c*) It may be considered as a rule of *action* for various officers having duties under it, thus giving rise to the *executive* function; this to be termed *Nomo-drastics.*

One word, finally, in explanation. Though these sciences are theoretically distinct, the content of two or more of them may in actual life be needed or used by the same person at one time; thus the legislator may have to consider Nomo-thetics or Nomo-politics, just as any citizen may; the judge may make use of Nomo-scopy; and the teacher and the student may use all. Each of these terms covers a distinct form of thought about law; yet the different branches, of course, are neither physically nor intellectually separate bodies of learning, — for example, in the way that a book on astronomy may be expected to be separate from a book on economics. This is because law deals with conduct, and with our relation to that conduct, and our thought of law is and must be often passing from one aspect to the other, or dealing with several at once. Thus, a student may say, "That is the law, and if it is not, it ought to be"; and at that moment he is thinking both nomo-statically and nomo-thetically. The important thing is to separate these two modes of thinking about law, and to label them with terms which will emphasize their distinctness. The virtue of the above classification is that it forces us to realize that in one and the same page or speech our thought is dealing with a different mass of data about law. Take any page of juristic writing, and see for oneself how much ambiguity is cleared up by keeping separate these different aspects of legal science.

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[3] This branch involves in strictness only the structure and mechanism of judicial action, and that of its appurtenant organs; *e. g.*, the distinction between judicial and legislative or executive action, the organization of courts, the liberty of decision for the courts (*stare decisis*, etc.), the relation of advocate to court and of the state prosecutor to the court, etc.

[4] This involves the structure and mechanism of the legislature, the methods of its action, the scope of different legislative bodies' powers (constitution, etc.), and, of course, the relation of legislature to courts and executive.

II

My second purpose here is to plead the cause of *Nomo-thetics* (and incidentally, of *Nomo-politics*) as a subject of scientific study in law schools and colleges, and in the legal profession; *i. e.*, that branch of legal science which tests a proposed or actual rule of law by asking whether it *ought* to be the law, by some standard of ethics, or of economics, etc.

Now it is obvious that every legislative act, and many a judicial decision, has been based on some notion of what ought to be the law. To study this might easily involve the study of the policy of thousands of casual proposals, important or trifling. But this would not be science. To study Nomo-thetics and Nomo-politics as a science means to study the *system* of rules or principles. They are to be regarded as a connected whole, disregarding the isolated rules and policies, however important, such as the regulation of the liquor traffic, the liability of judges, and the like. It means the study of the principal legal relations, so far as they have foundations in ethical, political, economic, and social science, and an inquiry into their correctness; asking whether they *ought* to be, and testing them by any philosophical school or standard that one pleases to take.

A prime and practical reason for advocating this study is that we are on the eve of a great period of radical reconstruction; in other words, of popular Nomo-thetics on a large scale, and that the legal profession is totally unprepared, by its present habits of thinking, to take leadership or control in this movement. Everything is going to be questioned, and the bar is not even prepared to expound adequately the principles that should be preserved. From the right of property, through the rights of succession, testament, contract, divorce, to the very function of courts and procedure, there is not a single fundamental which we are prepared to expound intelligently from a scientific standpoint. For over a hundred years, since the radical thinking of the Revolutionary period, the American lawyer has thought systematically only of law as it is, not as it ought to be. Even the Harvard Law School, the leader in light and learning of law for forty years past, has hitherto cultivated almost solely the science of Nomo-statics and Nomo-genetics — of law

as it is and law as it has been — with an emphatic ignoring of Nomothetics and Nomo-politics.

Hence, it is high time to begin the systematic cultivation of Nomothetics as a science.

Where shall we find the materials?

A hundred years ago, and more, they were plentiful, in the treatises on the law of Nature. Since that philosophy has been discarded, there are few available sources. The French and Spanish writers are the only ones on the Continent who have produced any systematic ones in the last forty years; and those are practically all either based on a Roman Catholic philosophy, or are otherwise unadapted for our purpose.

But in English much modern material exists in the ethical and sociological philosophers: Spencer, Green, Sidgwick, Ritchie, are some of the writers whose materials could be gathered into a valuable mosaic for study by lawyers and law students. A volume has been reserved for this subject by the Editorial Committee of the Modern Legal Philosophy Series (published under the auspices of the Association of American Law Schools).

If the philosophers in our Universities will coöperate, this volume can be made highly serviceable for the purpose. The problem is to compress into less than 800 pages a selection of readings which shall represent different philosophical viewpoints on a few main topics, and shall thus furnish material for eclectic reading and for free discussion.

What shall these main topics be? The following division, into two parts and eight chapters, is proposed (advancing from the concrete to the abstract, for pedagogical reasons):

Part I. *Institutions of Private Right.*

1. Family Relations.
2. Property Relations; Ownership.
3. Property Relations; Testament and Succession.
4. Contract and Industrial Relations.

Part II. *Methods of Law.*

5. Justice and Law (Individual Equity *v.* Uniform Rule).
6. Courts and Legislation.
7. Procedure.
8. Lawyers and Litigation.

I must now admit that a strong doubt has been expressed by a

colleague of mine, learned in pure philosophy as in law, whether the materials of such a volume are entitled to be deemed a part of the "philosophy" of law. Perhaps the answer to this doubt turns on the distinction between the terms "science" and "philosophy," and thus resolves itself (like many differences of opinion) into a mere question of name. But even if "philosophy" of law be only a part of the "science" of law, and if the topic I champion be not within that field of "philosophy," I desire to emphasize that it is at least within the field of "science." That is, there is now proposed for cultivation, not a mere matter of the expediency of a specific legal measure, but a matter of a body of principles systematically connected as a whole. A given legal measure may indeed be treated from the narrow point of view of local immediate expediency; it is then not science. But it may also be treated as part of a system; then it becomes a science. For instance, a piece of carbon serves as the detector in a wireless telegraph apparatus; can you use a diamond pin as a detector, because a diamond is carbon? That is a specific issue, all by itself. But rise to the general question of carbon as a chemical element, its various forms, and its relations to hydrogen in the total quantity of cosmic material, and you have a matter of science. So here in Nomo-thetics. Ask whether by law a father in Illinios should to-day be obliged to leave one-fourth of his estate at least to his child by will; and you have a local issue, if you like, and nothing more, — not a matter worth classing as legal science. But ask whether in general the owner of property should be permitted unlimited power of disposal of his property at death; test this question by its relation to the general ethical and economic principle of individual ownership and the general principles of family and of inheritance; inquire into its world-history; test it by general experience in the countries where such measures have not prevailed. Coördinate it with the general ethical theory on which private right is recognized, both as to acquisition and duration; and endeavor to make a consistent whole. This seems to me to be a genuine matter of science. It involves radically and fundamentally the necessity of finding and having a general principle for the recognition of private right, — in short, a science of Nomothetics or Nomo-politics, — law as it ought to be, as distinguished from law as it is. Moreover, according to whatever school of thought — the positivist, the Kantian, the neo-Hegelian, the

idealist, the sociologic, and all the rest of them — you accept for your general philosophy of law, so your result is likely to differ in settling this particular principle of compulsory succession. Which seems to show that the science of law, if not indeed its philosophy, is involved.

Moreover, this branch of legal science seems to me to have a legitimate place in a law-school curriculum, I do not say how large a place it should have. I say merely that it should have *some* place, and that in our traditional curriculum hitherto it has had *no* place. And so I plead for the explicit and systematic cultivation, during the next generation, in our law schools and colleges, of the sciences of Nomo-thetics and Nomo-politics.

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